

UNITED STATES MAGISTRATE COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

DEBORAH WEYMOUTH, ET AL
v.
COUNTY OF HENRICO, VIRGINIA

Civil Action No.
3:14 CV 419

July 14, 2015

**COMPLETE TRANSCRIPT OF SUMMARY JUDGMENT MOTIONS
BEFORE THE HONORABLE RODERICK C. YOUNG
UNITED STATES MAGISTRATE COURT JUDGE**

APPEARANCES:

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KRISTA L. HARDING, RMR
OFFICIAL COURT REPORTER

UNITED STATES MAGISTRATE COURT

(The proceeding commenced at 1:48 p.m.)

THE CLERK: Civil Case Number 14 CV 419. *Deborah Weymouth, et al, v. County of Henrico, Virginia.*

The plaintiff is represented by Mr. Harris D. Butler, III, Mr. Craig J. Curwood, and Mr. Philip J. Dean.

The defendant is represented by Lee Ann Anderson.

Are counsel ready to proceed?

MR. BUTLER: Ready, Your Honor.

MS. ANDERSON: Yes.

THE COURT: All right. Good afternoon.

So we're here on the matter of *Weymouth v. County of Henrico*. And this matter has been referred to me by Judge Payne for resolution of summary judgment motions going both ways. I believe the defendant has filed, and the plaintiff has filed, for summary judgment.

So having said that, I'd like to first hear from the plaintiff. So if you would come forward.

MR. BUTLER: Sure.

THE COURT: And the first question I have for you is as you're coming forward is that in the next, you know, thirty seconds to three minutes, just give me the *Reader's Digest* version of why the Court should grant summary judgment for the plaintiff.

MR. BUTLER: Certainly, Your Honor.

And it really lies in the burden of proof. Under the

1 Fair Labor Standards Act, the employees are typically
2 presumed to be covered by the Act unless a defendant
3 employer can prove by the burden of clear and convincing
4 evidence that they're entitled to an exemption. The
5 exemption that the County claims in this matter is the
6 executive exemption, and they base that on the fact that
7 they say fire station captains are exempt because of
8 their, as the County would put it, largely managerial
9 functions.

10 What we believe that the County overlooks is the 2004
11 amendments to the federal regulations. What -- after
12 post-9\11, it was -- there was a regulation enacted that
13 addressed first responders. And that regulation says that
14 irrespective of rank, first responder duties may not be
15 considered managerial.

16 So the issue, the crux of this case, is whether the
17 defendant may show, or has offered any proof, by clear and
18 convincing evidence, of their exemption. And we say they
19 have not, and that's why we're entitled to summary
20 judgment on that point.

21 THE COURT: So let me ask you this. If the defendant
22 satisfies the executive capacity test, which includes this
23 primary duty test, do they win?

24 MR. BUTLER: Well, they only satisfy that -- the
25 answer is if they -- if they demonstrate primary duty is

1 management then, yes, they win. They've met their burden
2 under clear and convincing evidence to that. However,
3 where the County --

4 THE COURT: So if they satisfy that and they show
5 that the captains' primary duty is management, then no
6 overtime, correct?

7 MR. BUTLER: That's correct, Your Honor.

8 THE COURT: All right. And if they don't show that
9 then --

10 MR. BUTLER: Well, and the reason that -- well, we
11 don't think it's quite as simple as Henrico County has
12 urged in their papers. They would say that this First
13 Responder Regulation from 2004 need not be addressed or
14 met. And they say that because they say that we meet the
15 primary duty test, and that we're entitled to our
16 exemption without regard to the First Responder
17 Regulation.

18 They basically say that we can ignore the fact that
19 these fire captains are sent out on responses. That the
20 preparedness that goes on in the fire station is not part
21 of, under their view of the world, first response and need
22 not be considered. That because they have an
23 organizational chart that places the fire captain, which
24 is the second-tier supervisor over the lieutenant and then
25 the fire captain, that because of their organizational

1 chart position that they need go no further. And that's
2 belied by 2004, just prior to the enactment of this
3 amendment.

4 The County Attorney's Office in Henrico looked at
5 this issue. And they looked at it from a budgetary
6 standpoint because they were going to have to spend the
7 estimated about \$300,000 a year. So in the last 10 years,
8 Henrico County has saved \$3 million by not paying fire
9 captains overtime as we believe the First Responder
10 Regulation requires, as most Virginia jurisdictions have
11 adopted.

12 THE COURT: Let me ask you this. Are captains
13 required to participate in firefighting?

14 MR. BUTLER: Yes. I mean, they actually -- because
15 of minimum staffing and the budget, which is again the
16 driving concern here, often -- trucks go out with three
17 people. They go out with a lieutenant, generally who
18 drives. They go out with a captain and a firefighter.
19 And other staff -- you know, if a lieutenant is not on, a
20 firefighter will drive.

21 But they have a rule that whoever drives the
22 apparatus, the fire engine, must stay with the engine.
23 That leaves a captain, generally, and firefighter to go
24 into the scene.

25 They have a rule of two in two out for safety

1 reasons. The fire captain is doing hands-on front-line
2 firefighting, as well as the preparedness that happens in
3 the --

4 THE COURT: So it's your position that they're
5 mandated? Not that they choose to, because that's a
6 different question, not that they choose to participate in
7 firefighting, but they're mandated to participate?

8 MR. BUTLER: The testimony from our clients would be
9 that if they did not respond that they would be
10 disciplined. The County argues that they have discretion.
11 That they can choose when to go and not to go. And that's
12 just factually not the case.

13 From a -- if for nothing more from an organization
14 chart standpoint, you know, that's the County's argument.
15 From a budgetary standpoint, from a minimum staffing
16 standpoint, there aren't enough bodies to do that.

17 THE COURT: Okay. Are captains evaluated on their
18 firefighting abilities? So when they have their yearly
19 evaluation, are they evaluated on firefighting, or are
20 they evaluated on their management team?

21 MR. BUTLER: Part of their job classification and job
22 description that the County relies upon includes, by the
23 County's own assessment, 30% daily of hazardous responses
24 be it fire or emergency.

25 THE COURT: Is the primary duty of the captain to

1 participate in firefighting, or is the primary duty to
2 manage the fire station?

3 MR. BUTLER: Well, that's the crux of the issue
4 before the Court. The primary duty, we believe, according
5 to the First Responder Regulation, is that their primary
6 duty is to fight fires. And there's no question this
7 record has evidence from, you know, both they do have
8 managerial roles, they have firefighting roles.

9 The County would minimize the firefighting roles. We
10 tend to maximize the value of the interest of firefighting
11 and first response.

12 The reason that we have fire stations that are --
13 when a buzzer sounds, able to get out immediately a first
14 response, be it a fire, accident scene, crime scene, is
15 because everything that happens in that firehouse is for
16 preparedness to be able to go at a moment's notice.

17 It is as one court that we cite, the *Barrows* court,
18 it's the Eastern District of Chattanooga, in a 2013 case,
19 *Barrows v. City of Chattanooga*. It says the nature of the
20 job is to wait. "*Extended periods of boredom, punctuated*
21 *by periods of urgency and moments of terror.*"

22 That court said that you cannot divorce preparedness
23 at the station from the ability to go at a moment's notice
24 and to respond to an emergency situation. That if you did
25 not have the preparedness, they could not go when the

1 buzzer sounded. They would have to gas vehicles, they
2 would have to prepare equipment, and all of that
3 preparedness is part of, and inextricably intertwined,
4 with the ability and the requirement to respond to the
5 emergency when it's alerted.

6 The *Barrows* court said that in looking at the primary
7 duty, you must view preparedness and the first response
8 time in order to determine that -- and in this case,
9 *Barrows*, the court decided that the captains under their
10 First Responder Regulation could not be considered
11 managerial.

12 THE COURT: In Henrico, do the captains engage in the
13 same front-line activities that their subordinates do?

14 MR. BUTLER: Absolutely. When they're on -- when
15 they're on shift, when they're on duty, they go with the
16 truck. They do the same firehose. They're another
17 firefighter on the scene.

18 THE COURT: All right. How much time do the captains
19 perform managerial work, and how much time do they devote
20 to non-managerial work? So if you take a 40-hour work
21 week -

22 MR. BUTLER: That gets to --

23 THE COURT: - not saying -- just let me finish.

24 - not saying hours, but percentage.

25 MR. BUTLER: Right. Well, that gets to what you

1 count. You know, if you count -- as the County would have
2 it, if you count all the preparedness functions, they
3 would say that everything they do, that every moment
4 they're watching a firefighter to evaluate, that every
5 moment -- even though the evaluation, the testimony has
6 been, is only, you know, several hours a year. So if you
7 look at the hours worked versus the hours time to prepare
8 the evaluation, very little time.

9 If you look at what happens in the firehouse, again,
10 it comes down to this question. Is this preparedness? As
11 the *Barrows* court would say, is it essential to the
12 response time, or is it time that is involved in
13 management? And that's the -- the crux of this case.

14 We believe that given the First Responder Regulation,
15 Henrico cannot meet its clear and convincing burden on its
16 exemption. And it does not get -- the tie does not go to
17 the County on this. They must meet, by clear and
18 convincing evidence, their affirmative defense of this
19 exemption in order to avoid an overtime obligation.

20 THE COURT: Do captains have freedom from
21 supervision, or do they carry out orders from those above
22 them?

23 MR. BUTLER: They report to a battalion chief. It's
24 a command structure. And as you're no doubt familiar, you
25 know, while each level has its own -- in a command

1 structure has its own degree of autonomy, and its own
2 degree of, you know, reporting a climb, in a command
3 structure, uniquely much of what is done in that
4 structure, for instance discipline, transfers, you know,
5 captains have no ultimate authority in those matters. It
6 all is above them.

7 But the County raises in their papers an interesting
8 analogy. It is that, you know, in a school situation that
9 a principal would say our responsibility -- our primary
10 duty is educating children. But if you look at it, who's
11 educating the children are the teachers. So they would
12 say the -- in that situation, which they liken to this,
13 that the principal, the fire captain, would be management;
14 the teacher, the firefighter, would be nonmanagement.
15 Aside from the fact that a different professional
16 exemption applies to school teachers, it's an interesting
17 analogy.

18 The better analogy is a command structure. That
19 would be a Marine unit out in the field. You have a
20 captain, a lieutenant, a sergeant, and officers, infantry
21 officers, in the field. All of them in the line of fire.
22 All of them -- even the second and third tiers of
23 "supervision" are actively engaged in front-line work as
24 Marines or infantry. That's more analogous in a command
25 structure.

1 There is back at the base a colonel, or somebody,
2 which is akin to the battalion chief. The battalion chief
3 does not do the -- does not ride on the truck, does not go
4 to -- they go to the fire, but they're looking at command
5 of the overall scene. That would be management.

6 Even though they do first response duties, you know,
7 they're not hands-on first response like fire captains.
8 That distinction is -- you know, the County says our
9 argument is that everybody who touches a first response
10 scene is exempt. That's not true. It's still a primary
11 duties test. It's just the primary duties test must be
12 viewed through the lens of the First Responder Regulation
13 that says irrespective of rank or grade, first responders,
14 you know, particularly first responders doing on-scene
15 response, that time cannot be viewed as managerial. They
16 view the on-scene response as managerial.

17 The deeper question here, of course, is the
18 preparedness piece, and whether the station time is
19 supervision managerial. And that really will factor one
20 way or the other how this case goes on these -- on the
21 exemption.

22 I will note that the cases that the defense cites
23 largely were tried by juries. They weren't -- they didn't
24 go out on summary judgment.

25 THE COURT: All right. Let me ask you this. How do

1 captains' salaries compare to those other employees?

2 MR. BUTLER: Their base pay is more than the
3 lieutenants. The lieutenants with overtime -- we don't
4 have all the numbers on this, but we have testimony that
5 lieutenants have said, you know, I don't want to be
6 promoted because I'll make less because with overtime we
7 think that --

8 THE COURT: What's the difference in the base pay
9 between a captain and a lieutenant?

10 MR. BUTLER: You know, I don't have that. I'm sure
11 Ms. Anderson does. It's in their -- in their papers. But
12 I know that the captain has a higher base pay than a
13 lieutenant.

14 THE COURT: All right. Do captains have any control
15 over any other employees in the fire station?

16 MR. BUTLER: They do have, you know, control over
17 certain assignments in the station. I mean, it's -- you
18 know, could not be said that they have no supervision over
19 the firefighters. They're really like working foreman.
20 And that gets to our good faith issue.

21 THE COURT: Do they do any training?

22 MR. BUTLER: They do training. They also are trained
23 to participate in training that they don't do. In fact,
24 in our facts --

25 THE COURT: So who are they training? Other

1 firefighters and lieutenants?

2 MR. BUTLER: They would train other firefighters. As
3 well as, you know, other firefighters and lieutenants also
4 lead training. So it's not exclusive to captains that
5 train.

6 THE COURT: Do they direct the work of any employees?

7 MR. BUTLER: They certainly direct work of
8 firefighters. Of course, any work that's directed on the
9 scene is, you know, in the First Responder Reg.

10 THE COURT: All right. Do they evaluate any other
11 firefighters?

12 MR. BUTLER: They do not perform the evaluations.
13 The lieutenants do that. But they approve the evaluations
14 as it goes up through the chain.

15 THE COURT: Do they handle any grievances?

16 MR. BUTLER: They are -- they may be involved as
17 witnesses. But generally that's higher in the command
18 structure. They can make recommendations, but they
19 typically are not the front-line HR, in other words, for
20 the -- for the station.

21 THE COURT: Do they have to handle any type of
22 discipline?

23 MR. BUTLER: They can't impose. They can recommend.
24 They can't impose transfers. They can't terminate on
25 their own. But that all, again, in a command structure

1 comes from above.

2 THE COURT: Do they assign any work to any other
3 employees?

4 MR. BUTLER: They certainly can assign work, although
5 they participate in the work as well. And again, the
6 First Responder Reg would say that irrespective of their
7 ability to direct with regard to first response matters,
8 that time cannot be considered managerial under the
9 regulation.

10 THE COURT: Pivoting to the fire station for a
11 minute. Do they have any control over the records and
12 statistics in the fire station?

13 MR. BUTLER: They are required in some instances to
14 prepare reports, post-incident reports. Of course the
15 First Responder Regulation says that those are also
16 nonexempt activities. Anything related to fire
17 suppression, or reports or investigations subsequent to.
18 But they also provide, you know, they do -- they have
19 normal administrative tasks.

20 THE COURT: What about fire drills? Do they have any
21 involvement in the timing of fire drills?

22 MR. BUTLER: Fire drills for training for the
23 officers?

24 THE COURT: Yes.

25 MR. BUTLER: Henrico has a separate division of

1 training. And I think they're the primary -- I mean, they
2 run the academy. And they also run most of the training.
3 A captain or lieutenant, or anyone else, I think a
4 firefighter can request that their unit receive training
5 at the fire training facility. Or I think there's two
6 facilities.

7 But there are, I think on occasion, training that the
8 captains are involved with, but that is also -- it moves
9 around. I mean, it's -- I think in practice the fire
10 station is somewhat egalitarian. I mean, it -- they shift
11 responsibilities and duties.

12 Now, the County would say that's because the captain
13 elects, you know, to participate in those. But the issue
14 of preparedness is not an elective. I mean, they must
15 have -- they are the ultimate captain of the ship in terms
16 of that station. They're the top on-the-scene
17 administrator.

18 THE COURT: Do they have any control over the budget?

19 MR. BUTLER: They have limited control. If they have
20 a specialty unit in their station, then they have
21 involvement with the budgetary process for that specialty
22 unit, if there's supplies that are needed for that
23 specialty unit.

24 But their budget, their payroll is driven by the
25 budget office in the County in the fire division that they

1 have. You know, the testimony is they have very limited
2 involvement in the day-to-day budget except for kind of
3 the wish list that they put together for their specialty
4 unit, if that have a specialty unit. Not all stations
5 have specialty units.

6 THE COURT: All right. Would you characterize the
7 captains' duties in the fire station, on the scene, their
8 duties in total, as mixed? That they have mixed duties?

9 MR. BUTLER: Absolutely. They have -- they're mixed
10 in terms of -- and I think the working foreman model is
11 the most appropriate.

12 THE COURT: Okay. So when you argue that a captain
13 is entitled to overtime, is your argument based on the
14 fact that their entitled to overtime is based on the way
15 their job description is laid out, or they're entitled to
16 overtime based on what they actually do in their job?

17 MR. BUTLER: The Department of Labor is very clear on
18 this. The title or label that you hang on somebody is of
19 no effect. The duties and functions that are performed is
20 what matters.

21 And with fire -- because of this First Responder
22 Regulation -- you know, I think this is a different case
23 without the First Responder Regulation. I mean, I don't
24 think the County would have any difficulty proving that a
25 captain that does these mixed working foreman type

1 functions may well be a manager under the general test in
2 the law absent the First Responder Regulation.

3 But with the First Responder Regulation, and the
4 reason that so many jurisdictions, except for Henrico,
5 have fallen in line and are compensating captains as
6 nonexempt is because you cannot do as the County has done,
7 and that is to actively avoid paying overtime to captains.
8 Because they viewed in 2004, and this is in the papers, an
9 internal memorandum that they rely on for their supposedly
10 good faith to avoid a third year of liability, they're
11 saying that we looked at this before the First Responder
12 Regulation was to be implemented, and we determined that
13 working foremen were to be paid comp -- were to be
14 compensated overtime.

15 Then they unilaterally, without any support, say but
16 we believe captains are senior executives and therefore
17 not entitled to overtime. There's no factual support from
18 2004 to date. They have not gone in and done any time
19 motion studies. They've not gone and checked to see what
20 the duties are. And that is a failure that subjects the
21 County to not only liquidated damages, which are presumed
22 when overtime is not paid when due, but a third year of
23 liability for willfulness.

24 THE COURT: Is there a written job description for a
25 captain?

1 MR. BUTLER: There's a job description that the
2 County has put together, as well as a classification
3 document. And those two documents are what we have gone
4 through with deponents in the discovery to look at what
5 the County sets out as -- and those documents set out that
6 the captains have ultimate responsibility for many things.

7 THE COURT: All right. And I'll ask about -- I'll
8 dig into that with Henrico in a little bit -

9 MR. BUTLER: Okay.

10 THE COURT: - when we get to that.

11 So let me ask this. Is it part of the captains' job
12 duties to make suggestions and recommendations regarding
13 hiring and firing?

14 MR. BUTLER: They can make suggestions, although the
15 testimony in the record is that they're not given
16 "*particular weight*," which is the standard. There are
17 examples in which -- so promotion in the fire department,
18 because it's a command structure, because it's public
19 service, is by competitive examination and interview.
20 There's an interview panel that is comprised -- and
21 captains are not required to be on interview panels. In
22 fact, two of the four plaintiffs have never served on an
23 interview panel.

24 There's a situation in which Ms. Weymouth, Captain
25 Weymouth, the plaintiff, had recommended someone to the

1 chief, and that recommendation, even though it came from
2 the interview panel, was rejected. So in a command
3 structure, the chief is really where the buck stops. The
4 chief gets to dictate and accept or not accept what
5 happens.

6 Discipline cannot be imposed by a chief -- by a
7 captain. Transfers cannot be unilaterally imposed by a
8 captain. Everything comes from above. They do have
9 input. They may or may not be asked. There's testimony
10 by one of our plaintiffs that they've never been asked by
11 the chief for on, you know, lieutenants that have been
12 promoted out of their station to captain. They never got
13 a call.

14 The County says that the -- and the chief supplied an
15 affidavit saying that he regularly calls and asks for
16 input. So, you know, that's at a minimum a fact question.

17 THE COURT: So it's your position that captains don't
18 directly hire or fire?

19 MR. BUTLER: They do not. That's uncontested. The
20 County --

21 THE COURT: But they do have the ability to evaluate
22 employees, is that correct, once they're hired?

23 MR. BUTLER: They sign off on lieutenants'
24 evaluations.

25 THE COURT: All right. Okay. All right.

1 Let's see. What do captains do at firefighting
2 scenes?

3 MR. BUTLER: They do the same things that the
4 firefighters and lieutenants do. They enter the building.
5 They suppress fires. They pull the hose. They use
6 ladders. I mean, they are another two hands on the fire
7 scene. They're providing first response.

8 THE COURT: Okay. Now, I think it was your brief
9 that made the point that captains aren't necessarily in
10 charge of the firefighting scene when they get there.
11 It's kind of based on where they're sitting in the
12 vehicle.

13 MR. BUTLER: There's a hierarchy on the engine on
14 where the -- you know, who sits in what is in command of
15 the engine. And that may or may not be the captain. That
16 was that point. They clearly have the right, you know.
17 And if they desire to pull rank, you know, they could.
18 But the First Responder --

19 THE COURT: So they're still the captain?

20 MR. BUTLER: They're still the captain. And they're
21 not delegating, you know, or advocating their role.

22 But, you know, under the First Responder Regulation,
23 none of that time may be considered management, and, you
24 know, the County wants to consider that as management.

25 THE COURT: All right. Well, let me give you this

1 analogy. So in a former life I was a supervisor in the
2 United States Attorney's Office. And when I was there, as
3 a supervisor I didn't have to try cases. I had five
4 attorneys that worked for me who tried cases. Now, I
5 still tried cases.

6 So under your view of the case, would that make me
7 not a manager because I had a full caseload?

8 MR. BUTLER: Well, I think in order to apply that you
9 would have to be applying it as a first responder because
10 this First Responder Regulation really is, you know, the
11 key.

12 The fact that -- so what the Department of Labor
13 would say outside of the first responder context would be
14 that if a manager performs some incidental duties -- I
15 mean, there's a case, *Family Dollar*, a 2011 case, with the
16 Fourth Circuit where they looked at assistant managers who
17 also did stock shelf stocking and cash register duties.
18 There's also an Eleventh Circuit *Family Dollar* case that
19 goes the other way and says that you have to look at the
20 duties.

21 But the test under the Department of Labor
22 regulations is duties. So if you are a manager and you
23 are both doing a manager role the majority of your time,
24 and also nonmanagerial duties, you're still a manager.
25 You're still exempt. But that's, you know, not the lense

1 that this case must be viewed through because of the --

2 THE COURT: So you're saying when I was at the U.S.
3 Attorney's Office I will still a manager?

4 MR. BUTLER: You're a still a manager.

5 THE COURT: Okay. So why isn't a captain a manager?

6 MR. BUTLER: Because of the First Responder
7 Regulation. And that changes the ballgame here. And that
8 is because the Department of Labor, through a notice and
9 comment period, put out this regulation. It's 29 CFR
10 541.3, scope of the Section 13(a)(1) exemptions.

11 And in 2004, there were amendments to the
12 white-collar exemptions to try to clarify how these
13 exemptions would apply. And the Department of Labor
14 wanted to be sure that they were not over, you know,
15 misapplied and so they did two things.

16 They said in (a) that they talk about a blue-collar
17 exemption. They say if you're a blue-collar worker, then,
18 you know, they list several types of carpenters, plumbers,
19 types of occupations. And you're going to be entitled to
20 overtime.

21 Then in (b) they said also if you're a firefighter it
22 says -- the Section 13(a)(1) exemptions. The white-collar
23 exemptions. And the regulations said in this part do not
24 apply to "*fire fighters, paramedics, emergency medical*
25 *technicians, ambulance personnel, rescue workers,*

1 *hazardous materials workers and similar employees,*
2 *regardless of rank or pay level who perform work such as*
3 *preventing, controlling, or extinguishing fires of any*
4 *type; rescuing fire, crime or accident victims; conducting*
5 *investigations," et cetera.*

6 And they say in (2) and (3), sub (2) and (3) that is,
7 they're not to be considered exempt because their primary
8 duty there is fighting fires. Not as first responders.
9 Not as management.

10 So that regulation is the lens through which a fire
11 captain who performs first response duties as a working
12 foreman, because they do both. There's no question they
13 do some managerial roles --

14 THE COURT: So it's your view that the captains are
15 blue-collar workers?

16 MR. BUTLER: No. The blue-collar analysis is -- in
17 fact, that's the analysis that Judge Hilton used, we think
18 incorrectly, in the Fairfax case. The blue-collar
19 exemption talks to -- or the fact that blue-collar workers
20 shall not be considered as managerial is a separate and
21 distinct category from the following paragraph which talks
22 to fire personnel.

23 What Judge Hilton did is he conflated the two and he
24 said that in order to be -- in order to be protected under
25 the -- or entitled to overtime, as a firefighter you have

1 to be a "*blue-collar firefighter*". There's no case that
2 Judge Hilton cites for support of that. It's -- there's
3 no case that can be supported.

4 THE COURT: As a general matter though, as a general
5 matter when it comes to overtime, isn't it such that
6 generally blue-collar workers are more entitled to
7 overtime than traditional white-collar workers?

8 MR. BUTLER: Well, that's -- that's the purpose of
9 this particular -- that's to clarify that. I mean, this
10 particular regulation in 2004 said blue-collar workers --
11 and they have a list of, you know, it's "*carpenters,*
12 *electricians, mechanics, plumbers, iron workers,*
13 *craftsmen, operating engineers, longshoremen*" --

14 COURT REPORTER: Mr. Butler --

15 MR. BUTLER: I'm sorry.

16 THE COURT: You can't talk faster than she can type.

17 MR. BUTLER: "*Carpenters, electricians, mechanics,*
18 *plumbers, iron workers, craftsmen, operating engineers,*
19 *longshoreman, construction workers and laborers are*
20 *entitled to minimum wage and overtime*" pay and are not
21 exempt.

22 It then goes on in a second clarifying statement to
23 say these exemptions also do not apply to police officers,
24 firefighters, et cetera. They don't combine the two.

25 They make it clear that blue-collar workers are to be

1 exempt. Then they make it clear that under this First
2 Responder Regulation, irrespective of rank --

3 THE COURT: What color is the shirt that firefighters
4 wear?

5 MR. BUTLER: You know, they just -- they had a
6 change. I think it's blue. And I think the captains had
7 worn blue and now they're white.

8 THE COURT: What color does the chief wear?

9 MR. BUTLER: He's here today. I think blue.

10 THE COURT: I think white.

11 MR. BUTLER: Oh, shirt? Okay. White.

12 I thought you meant the outside uniforms.

13 THE COURT: Okay.

14 MR. BUTLER: But I think that they changed that, you
15 know, to -- you know, after the suit. Now they say that
16 that's because the captains had asked for it. You know,
17 that's not the point. The point of the side in the brief
18 was that that change had not been made until after
19 litigation.

20 Now, irrespective of why or who wanted it, it was to
21 create an outward appearance of, you know, more managerial
22 than firefighter.

23 THE COURT: Okay. Is there anything else you want to
24 tell me before I hear from Henrico's counsel?

25 MR. BUTLER: Well, I think that the information

1 that's in the County's file from 2004 when they were
2 looking at this regulation, the First Responder Regulation
3 coming into law, they accumulated -- Mr. Cobbell, who was
4 the Director of Human Resources in Henrico County at the
5 time, accumulated a number of articles that talk about the
6 upcoming regulatory change and how it will apply to
7 firefighters and fire captains, first responders under
8 this regulation. These treatises, including a Fair Labor
9 Standards Handbook, including, you know, something from
10 Thompson Publishing, including something from a Fair Labor
11 Standards Act, you know, publications. So, I mean,
12 they're learned treatises in the area. All without
13 exception say that presumptively first responders are to
14 be nonexempt or to be paid overtime.

15 They have Power Points from law firms included in
16 these materials that say, again, presumptively,
17 firefighters are to be included as nonexempt.

18 The jurisdictions -- and there's a declaration from
19 our brief --

20 THE COURT: Why is a captain, though, a first
21 responder as opposed to a --

22 MR. BUTLER: Because as the Department of Labor
23 regulations require, you have to look at their job
24 function. And their job function is that they are on the
25 scene. They are hands-on on the scene. They are hands-on

1 preparing for the scene just -- they -- the same duties
2 the firefighters perform, the same duties as the
3 lieutenants, both of who are paid overtime and are
4 nonexempt are done by the fire captains.

5 THE COURT: Okay.

6 MR. BUTLER: So under the law, and under the
7 regulation, there's really no avoiding the fact that the
8 first responders have to be considered -- fire captains
9 must be considered first responders, some of their duties.

10 The question is, without looking at what those duties
11 are and how the, for instance, station house preparedness
12 relates to the first response duties, which the County
13 never did which means that they have a real problem on
14 good faith. They have a real problem on willfulness in
15 the third year of exposure because they knew. They said
16 that they recognized and read that change to say that
17 working foremen should be covered. They just declared
18 unilaterally, and without any support in the record,
19 declared that captains are high senior executives in their
20 organization done purely off their organizational chart.

21 THE COURT: Okay. Thank you, Mr. Harris.

22 MR. BUTLER: Thank you.

23 THE COURT: And now let me hear from you,
24 Ms. Anderson.

25 So, same thing. In the next three minutes, just tell

1 me why Henrico County is entitled to summary judgment.

2 MS. ANDERSON: Henrico County is entitled to summary
3 judgment because Henrico County has properly classified
4 its fire station captains because their primary duty is
5 management of the fire station and of the fire station's
6 personnel. Our classification is not dependent upon any
7 of the duties that the fire station captains perform on an
8 emergency scene; therefore, the First Responder Regulation
9 is completely irrelevant to the Court's analysis.

10 And as plaintiff has acknowledged, once you take the
11 First Responder Regulation out of the analysis, we have
12 appropriately met the four factors governing the test as
13 to whether or not our fire station captains are exempt
14 executives under the FLSA.

15 THE COURT: Okay. So do you agree with plaintiff
16 that if you satisfy the executive capacity test, which
17 includes this primary duty test, that you prevail?

18 MS. ANDERSON: Yes.

19 THE COURT: All right. Okay.

20 Are captains required to participate in nonmanagement
21 duties?

22 MS. ANDERSON: No, they are not required to
23 participate in nonmanagement duties. We have a lot of
24 testimony in the record that our fire station captains are
25 washing trucks, mopping floors, cleaning up around the

1 station. That also -- we also have testimony from each of
2 the plaintiffs --

3 THE COURT: Is fighting a fire a nonmanagement duty?

4 MS. ANDERSON: Fighting a fire is a nonmanagement
5 duty.

6 THE COURT: Are they required to participate in
7 firefighting?

8 MS. ANDERSON: When they are assigned -- when they
9 assign themselves to one of the units that responds to a
10 fire, they must participate, yeah. As a firefighter, they
11 have to respond.

12 THE COURT: That's a different question. That's when
13 they assign themselves.

14 MS. ANDERSON: That's correct.

15 THE COURT: So under Henrico County regulations, or
16 whatever regulations govern that govern the fire
17 department, I presume a firefighter is required to -

18 MS. ANDERSON: That's correct.

19 THE COURT: - fight a fire?

20 MS. ANDERSON: That's correct. A firefighter and a
21 lieutenant --

22 THE COURT: A lieutenant is required to fight fires?

23 MS. ANDERSON: Yes.

24 THE COURT: Is a captain required to go out and fight
25 fires?

1 MS. ANDERSON: A captain is not required to assign
2 themselves to a unit.

3 THE COURT: All right.

4 MS. ANDERSON: They have the discretion to remove
5 themselves from the unit. And as soon as they remove
6 themselves from the unit, they are no longer required to
7 respond to the emergency scene.

8 THE COURT: Okay. When fire captains are evaluated,
9 if they have a yearly evaluation or a 6-month evaluation,
10 are they evaluated based on any firefighting
11 participation?

12 MS. ANDERSON: The Henrico performance evaluations
13 are on a series of issues. They would be evaluated on
14 their job duties. The job duties that are outlined in the
15 job description. Certainly, their management of a fire
16 scene and their performance on a fire scene is a small
17 part of their job duties.

18 But if you take a look at the job description, fire
19 captains are evaluated on how they manage the station
20 house. How they manage the personnel assigned to the
21 station. How they manage the budget. How they are
22 dealing with the construction issues of the station. How
23 they are ensuring operational readiness of that station.
24 The quality and consistency of training across the three
25 shifts that report to them. Those are the issues that a

1 fire captain is evaluated on.

2 THE COURT: When you say with -- first of all, with
3 respect to a job description, is there a job description
4 for captains?

5 MS. ANDERSON: There is.

6 THE COURT: And was that included as part of the
7 record?

8 MS. ANDERSON: Yes, sir. There is both a class
9 specification and a job description. A class
10 specification is for the entire captains, including
11 captains that don't serve at stations. That was included
12 as Exhibit A to the affidavit, Paula Reid affidavit, in
13 support of the defendant's summary judgment motion.

14 And that class spec outlines what the primary purpose
15 of a captain's job is, which is to manage the station.
16 And lists a series of examples of work that when each of
17 the plaintiffs were deposed they all agreed, yes, these
18 are all job functions that I am responsible for that I
19 perform, or otherwise delegate to someone else in my
20 station house, and that I am evaluated on and held
21 accountable for.

22 So there's no dispute whatsoever in the record that
23 the plaintiffs acknowledge these are their job functions.
24 So it's not just a class spec or a class -- a job
25 description that's sitting out there that someone

1 manufactured in HR. The plaintiffs understand that these
2 are indeed their job responsibilities.

3 THE COURT: And when you say a job -- "*Class*
4 *Specification For Fire Captain*," that's what I have here
5 entitled 2-A, I believe?

6 MS. ANDERSON: Yes, Your Honor.

7 THE COURT: And then when you say "*Job Description*,"
8 are you referring to a document I have that's entitled
9 2-D? It says, "*Job Description Essential Function Job*
10 *Evaluation*."

11 MS. ANDERSON: I believe it is at 2-C, the Reid
12 affidavit.

13 There is -- 2-A is the current class specification.
14 At 2-C is the current job description for Plaintiff
15 Hughes.

16 THE COURT: Okay.

17 MS. ANDERSON: 2-D, Your Honor, is a prior job
18 description that the captains of -- that the current job
19 description is based on. But that the captains holding
20 the jobs in prior decades said, in their own handwriting,
21 these are my job duties and this is what I think is the
22 most important job function.

23 THE COURT: Yes. If a captain assigns themselves of a
24 duty of fighting fires -

25 MS. ANDERSON: Yes.

1 THE COURT: - is his primary, his or her primary,
2 duty to extinguish fires and rescue victims, or is his or
3 her primary duty to manage the fire station?

4 MS. ANDERSON: On the day that a fire captain sits on
5 that engine, his perhaps most urgent task and his primary
6 concern ought to be fighting the fire and dealing with the
7 citizens of -- and attending to that emergency scene.
8 That does not, however, translate or change his primary
9 duty as a station captain for all of the other days that
10 he is station captain.

11 THE COURT: All right. How much time do captains
12 spend -- and this is presuming that they've assigned
13 themselves to a fire engine to fight fire. How much of
14 their time percentage-wise is performing managerial
15 duties, and how much of their time is performing
16 nonmanagerial duties, including the firefighting, but
17 including cutting the grass, washing the fire engine,
18 or duties that they could normally assign to another
19 person?

20 MS. ANDERSON: We have, the record shows, that for
21 the four plaintiffs, each of the four of them for the time
22 that they spent on an emergency scene, the maximum amount
23 of time of their on duty percentage was 3%. They spent
24 less than 3% of their on duty time on an emergency scene.

25 And that includes the time that they spent as acting

1 battalion chief. So that number, 3%, includes not only
2 the time that they were on the engine or on the truck, but
3 also that they were serving in the exempt capacity, as the
4 plaintiff's acknowledge, as the acting battalion chief.

5 There is no equal study as far as the amount of time
6 they spend performing management functions. There's
7 testimony in the record that their -- the time that they
8 spend washing a truck or cleaning up took approximately
9 one hour a day, which would equal to about 4% of their
10 time.

11 So doing some rough math, assuming that they're
12 spending most of their day performing their functions that
13 they're assigned to, and responsible for doing, it would
14 show that the majority of their time is spent managing and
15 dealing with personnel issues and station issues. And we
16 know --

17 THE COURT: So would you say 93% of their time is
18 spent doing management duties, and then 7% is spent doing
19 front-line duties?

20 MS. ANDERSON: I would love to agree with that
21 number. I will tell you, math is not my forte.

22 THE COURT: Neither is mine. That's why I went to
23 law school.

24 MS. ANDERSON: And we've got to add in some sleeping
25 time. I mean, I recognize these are guides, but the

1 numbers are based on a 24-hour shift. And we certainly
2 recognize that sleeping is part of it. And I can't, you
3 know, divide the day up like that.

4 But I think the critical function is the amount of
5 time spent is only one of the factors in weighing the
6 primary duty, okay. And clearly, that factor weighs in
7 favor of the County and not in favor of the plaintiffs
8 because the proposed primary duty the plaintiffs would
9 have this Court to believe, their primary duty is first
10 response work, that they spend a negligible portion of
11 their on duty time performing.

12 THE COURT: Who supervises the captains?

13 MS. ANDERSON: Captains report to either a battalion
14 chief or a district chief.

15 THE COURT: All right. And it's their -- part of
16 their duties is to enact the orders of the battalion
17 chief, correct?

18 MS. ANDERSON: That's correct. Except the station
19 captains aren't supervised on a daily basis by their
20 battalion chiefs or district chiefs. They are --
21 typically, a battalion chief or a district chief would
22 take control on the fire scene. But battalion chiefs and
23 district chiefs do not live in the station. They leave
24 the station management duties up to the individual station
25 captain.

1 THE COURT: So the station captain is the top guy in
2 his -- in his or her particular station?

3 MS. ANDERSON: He is the top guy in the station. And
4 we have a organizational chart from Station 22. And this
5 is not an org chart that was just plucked out of the air.
6 This is an org chart that's based on Plaintiff Spencer's
7 testimony where he said that at Station 22 he is the
8 station captain. He supervises 30 different employees
9 that are assigned to three separate shifts. A shift, B
10 shift, and a C shift, okay?

11 The battalion chief -- there are battalion chiefs at
12 Station 22. That's one of the stations of the 20 stations
13 in Henrico. That's one of the stations that they live at.
14 But the station -- the battalion chiefs aren't focused on
15 the management of the station and of the station's
16 personnel. That is the role, the central role, the
17 primary duty of the station captain.

18 THE COURT: How does the salary of the captain
19 compare to the salary -- let's talk base salary for just a
20 second.

21 MS. ANDERSON: Okay.

22 THE COURT: How does the base salary of the captain
23 relay -- or how is that compared to the base salary of the
24 lieutenant, for example?

25 MS. ANDERSON: Okay. And you're correct to focus on

1 that, because that's what the regs require us to focus on.
2 What are -- is the salary as compared to the wage. It's
3 not the overall annualized, what you could get with
4 overtime. In fact, we've got case law saying you discount
5 overtime in that comparison.

6 And I don't have an exact salary number. I have
7 grades. As you know in government structure, you have
8 captains are paid at a Grade 33, lieutenants at a Grade
9 30, and firefighters are somewhere between a Grade 23 and
10 28, okay?

11 And that 3-grade difference is significant in
12 government work. It's showing a significant increase of
13 salary as you go up in the promotional scale.

14 THE COURT: All right. Do captains have control over
15 the other employees in their station?

16 MS. ANDERSON: Absolutely.

17 THE COURT: All right. Do they train employees?

18 MS. ANDERSON: They do train employees.

19 THE COURT: All right. Do they direct their work?

20 MS. ANDERSON: They do direct the work. And
21 significantly, they direct the work -- and can I be heard
22 if I step away from -- can you hear me if I step away?

23 THE COURT: As long as she can hear you.

24 MS. ANDERSON: Okay.

25 THE COURT: I can hear you.

1 MS. ANDERSON: Okay. Very good.

2 They not only train those that -- on a particular
3 shift, but they also ensure consistency across the
4 different shifts. The captain is the only individual in
5 the fire station that can train A shift, B shift, and C
6 shift to a common theme. They are not a working foreman.

7 A working foreman would be, for example, this
8 lieutenant who's on the truck, or this lieutenant who's on
9 the engine. This lieutenant on the truck company
10 supervises these four firefighters who are assigned to the
11 truck. And he trains them on the truck.

12 But this lieutenant here on Shift A on the -- who's
13 assigned to the truck, the ladder truck, he has no ability
14 whatsoever to train any of the firefighters on B shift, or
15 any of the firefighters on C shift. He has no ability to
16 evaluate their performance. He has no ability to
17 supervise them, to direct them, to assess whether or not
18 they are operationally ready to perform.

19 Only the captain who works on the D, E, F shift and
20 can work some days with the folks on A shift, other days
21 with the firefighters on B shift, and other days with the
22 firefighters on C shift, only he's positioned.

23 THE COURT: Does the fire department engage in annual
24 or semiannual reviews of their employees?

25 MS. ANDERSON: It does. We have an annual formal

1 review performance evaluation.

2 THE COURT: So once a year. Who conducts that for
3 Fire Station Number 22?

4 MS. ANDERSON: Fire Station 22, the firefighters that
5 are assigned to this ladder truck are reviewed by --

6 THE COURT: When you "*this*," is that A?

7 MS. ANDERSON: Yes, sir.

8 THE COURT: All right.

9 MS. ANDERSON: Thank you.

10 On A shift, the four firefighters who are assigned to
11 the ladder truck on A shift are reviewed by the lieutenant
12 assigned to the ladder truck. That lieutenant is
13 evaluated by the station captain. That station captain
14 also reviews all four firefighters who are assigned to the
15 ladder truck on A shift.

16 And there's testimony in the record that -- from
17 several of the fire captains that they have the authority
18 to change those evaluations if they disagree with the
19 lieutenant, or to go back and ask questions and clarify
20 and make -- so that their performance is correctly
21 evaluated.

22 THE COURT: After that yearly evaluation is
23 completed, is it a requirement that the station captains
24 sign that evaluation? So in other words, your
25 firefighters are evaluated by your lieutenant, and your

1 lieutenant, I presume, signs that evaluation. Before that
2 evaluation is final, does it have to be signed by the
3 station captain, or is it final once the lieutenant signs
4 it?

5 MS. ANDERSON: It has to be signed. And it's an
6 electronic process. So there's no actual signature.

7 THE COURT: Right.

8 MS. ANDERSON: But it has to be approved by the
9 station captain.

10 THE COURT: Okay. Does the station captain handle
11 grievances and complaints?

12 MS. ANDERSON: The -- technically, there's a 4-step
13 grievance process in the County. And a station captain
14 would be at Step 1 if he were the direct supervisor of the
15 person grieving. Step 2 --

16 THE COURT: Well, the captain is the direct
17 supervisor of the lieutenant, right?

18 MS. ANDERSON: And so therefore if a lieutenant is
19 grieving, the station captain would be the person making
20 the decision at Step 1.

21 THE COURT: What about if the firefighter is
22 grieving?

23 MS. ANDERSON: If a firefighter is grieving, the
24 lieutenant would go through his lieutenant for Step 1, and
25 go through the chief at Step 2. All of the grievances go

1 through the chief at Step 2.

2 THE COURT: So hold on a second. And so if a
3 firefighter has a grievance, he or she takes that
4 grievance to the lieutenant, correct?

5 MS. ANDERSON: The -- it's a 4 -- the 4-step
6 grievance process is for all localities throughout the
7 Commonwealth of Virginia. Step 1 is with your immediate
8 supervisor.

9 THE COURT: So for a firefighter that's --

10 MS. ANDERSON: For a firefighter, it would be the
11 lieutenant.

12 THE COURT: Okay.

13 MS. ANDERSON: And Step 2 is with the head of your
14 agency.

15 THE COURT: Okay.

16 MS. ANDERSON: So for everybody it would be the fire
17 chief.

18 THE COURT: Okay.

19 MS. ANDERSON: Step 3 is the head of the County,
20 which would be our County manager. And Step 4 would be a
21 panel.

22 THE COURT: Okay.

23 MS. ANDERSON: And we certainly have testimony in the
24 record that lieutenant -- that captains, fire station
25 captions, participated in the grievance process where they

1 had recommended the termination of a firefighter under
2 their command. We have Assistant Chief Baxter saying he
3 participated in a grievance process where he recommended
4 the termination of a firefighter. And we have Plaintiff
5 Weymouth, Captain Weymouth, where she recommended the
6 termination of a firefighter. She was also involved in
7 the grievance process.

8 THE COURT: Are captains involved in any way
9 regarding the discipline of employees?

10 MS. ANDERSON: Absolutely.

11 THE COURT: Or employees to be disciplined?

12 MS. ANDERSON: Yes.

13 THE COURT: All right. And how does -- how did that
14 work?

15 MS. ANDERSON: Captains are expected to recommend
16 discipline for those within their fire station, okay?
17 They cannot unilaterally issue or implement discipline.
18 But there's no requirement in the regs that they issue
19 discipline unilaterally.

20 In fact, the regulations clearly state that lack of
21 unilateral authority does not undermine the "*particular*
22 *weight*" notion for Factor 4 of whether or not their
23 recommendations as to discipline are given a particular
24 weight. And that's at 29 CFR 541.105.

25 So they would make a recommendation. It would go up

1 the chain for approval so you would have consistency
2 across the 20 fire stations. So one guy at Fire Station 6
3 isn't getting a written reprimand, where the guy at Fire
4 Station 22 is being suspended for the same infraction.

5 And then the fire captain would be the one to --
6 often is the one to implement the discipline.

7 THE COURT: All right. Now, do the captains in
8 Henrico County maintain the records and statistics for
9 their particular fire station?

10 MS. ANDERSON: Captains have a captains' office at
11 their fire station. They -- there's information in the
12 record showing that they have control over the personnel
13 records of the individuals assigned to that fire station.

14 There's clear information in the record showing that
15 the fire captain is responsible for the budget for any
16 specialty shops or specialty teams at his fire station.

17 THE COURT: Who provides for the safety and security
18 of the employees at the particular fire station?

19 MS. ANDERSON: That's the job of the station captain.

20 And you have an interesting story in one of the
21 depositions from Captain Redford when one of his
22 firefighters backed an engine into the station and took
23 out a load-bearing pillar in the station. He was called.
24 Captain Redford was not on duty that day, but he was
25 called to come to the station.

1 And why did he come to the station? For two reasons.
2 To make sure that that station continue -- could continue
3 to meet the needs of its citizens and dispatch calls, and
4 also to make sure of the safety of the firefighters
5 assigned to that station, given that the station had had a
6 construction problem.

7 THE COURT: What about any kind of legal compliance?
8 Whose responsibility is that for the particular stations?

9 MS. ANDERSON: Certainly, a station captain. One of
10 the lists of the examples of work that they are supposed
11 to make sure that the rules and regulations of the Fire
12 Division of the County of Henrico are made available to
13 the -- the personnel assigned to that station. They're
14 also in charge of making sure that any infractions, people
15 who violate those rules, that those rules -- that those
16 individuals are investigated and appropriately
17 disciplined.

18 THE COURT: Okay. What control do chiefs have over
19 the captains?

20 MS. ANDERSON: I mean, certainly chiefs in a
21 hierarchical structure are above the captains.

22 THE COURT: So you agree with the plaintiff that the
23 firehouse is -- this is where I'm going with this. You
24 agree with him that it's a command structure?

25 MS. ANDERSON: It is a command structure. And at the

1 firehouse, though, the captain is at the top of that
2 command structure.

3 THE COURT: Okay. So when a captain assigns himself
4 to a fire engine, for lack of a better term, that he has a
5 responsibility to be part of the team and go out and fight
6 fires so they have the proper number of people, would you
7 categorize the captains' duties -- as having mixed duties,
8 both managerial and nonmanagerial?

9 MS. ANDERSON: I would. I would say that -- and I
10 think that there's evidence in the record that for the
11 overwhelming majority of the time, the captain sits in
12 command of that apparatus that departs.

13 If you take a look at the McDowell -- the second
14 affidavit that -- by Chief McDowell, Exhibit A, which
15 shows the number of times the unit was dispatched and
16 where the captain rode, and if the captain rode -- rides
17 in the officer in charge position, he's in charge of that
18 unit. So, yes.

19 When he's on scene, he's in charge of that fire
20 scene, he's in charge of the unit, in charge of the
21 personnel. He's supervising them. There is a management
22 role there.

23 What I want to be careful to state though is that the
24 County's classification of the fire captain is not based
25 on the management role he performs on emergency scenes.

1 And that is what makes the First Responder Regulation
2 irrelevant to the Court's analysis because the County
3 premises its classification of the fire station captain
4 for his management role at the station. Ensuring the
5 operational preparedness of the station, and ensuring a
6 consistency across the different shifts.

7 THE COURT: So let's say if your captain does not
8 assign himself -- first of all, are there any captains in
9 Henrico County who do not assign themselves to a unit such
10 that they're not part of the number of individuals who go
11 out on the scene to an emergency?

12 MS. ANDERSON: I want to be clear. There are 20 fire
13 stations, and in this litigation we're talking about the
14 station captains. We do have other captains in purely
15 administrative roles who are not -- and do not typically
16 respond. There's no -- there's no engine unit assigned to
17 the training facility, for example.

18 THE COURT: Very good. So for a captain who does not
19 assign themselves to an engine to respond to an emergency,
20 would you classify that captain's duties as mixed, or
21 would you classify that captain's duties as purely
22 managerial?

23 MS. ANDERSON: Okay. I would classify the fire
24 station captains' duties - I want to be clear - as mixed
25 only when they are on the fire scene, okay? I do not

1 classify their duties as mixed when they are in the
2 station house.

3 THE COURT: But what if they volunteer to cut the
4 grass? Or certainly cutting the grass isn't a managerial
5 duty, right?

6 MS. ANDERSON: Absolutely. It's not a managerial
7 duty.

8 THE COURT: Certainly washing the fire engine is not
9 a managerial duty?

10 MS. ANDERSON: Absolutely not. And nor is it a duty.

11 THE COURT: All right.

12 MS. ANDERSON: It is something that they elect to
13 spend their day. And they choose to do that for a
14 management purpose to implicate a sense of comradery to
15 show that they're no better than the rest of the team.

16 To lead by example, which, as Mr. Butler pointed out
17 under the FLSA, the *Family Dollar* case in the Fourth
18 Circuit, executives can multitask. It's a concurrent
19 duty. And when they choose to multitask by spending some
20 of their time on nonexempt duties, that's apparently a
21 part of being management.

22 THE COURT: When you make the argument -- you're
23 obviously making the argument that the station captains'
24 duties are management in nature. Are you making that
25 argument based off of the job descriptions that you kind

1 of cited in Exhibit 2A, and B, and C, and all that? Are
2 you making that argument based -- from a practical
3 standpoint of what the station captains actually do?

4 MS. ANDERSON: The latter. A practical standpoint.

5 Mr. Butler's correct. If our job descriptions had no
6 basis in reality, I would be on very thin ice. But all of
7 the plaintiffs acknowledge that those jobs listed in their
8 job descriptions were jobs that they were responsible for.
9 And we heard testimony from each of the plaintiffs that
10 they actually performed, or they delegate the performing
11 of those jobs, which is another inherently executive
12 function.

13 So -- and we had a lot of testimony from former
14 captains that talked about their management role with
15 respect to the station, its construction, its -- and its
16 supervision of its personnel.

17 THE COURT: All right. With respect to personnel, do
18 station captains have any input on hiring and firing?

19 Let's separate those for a second. So, does the
20 station captain have any input on hiring?

21 MS. ANDERSON: The hiring process is not one that a
22 station captain would normally be involved in. They could
23 sit on a hiring committee or a hiring panel, but typically
24 that's a -- an academy that's brought through in a very
25 different type of process.

1 THE COURT: All right. Do they have any input on
2 firing?

3 MS. ANDERSON: Absolutely.

4 THE COURT: Do they have the unilateral ability to
5 fire anyone under their command?

6 MS. ANDERSON: No. There's only one person in the
7 fire department that can do that, and that's the chief.

8 THE COURT: All right. Okay.

9 You've answered some of my questions so I don't want
10 to repeat that.

11 I'm going to ask you the same question I asked
12 Mr. Butler.

13 And I'm sorry. I kept calling you Mr. Harris.

14 MR. BUTLER: It happens all the time.

15 THE COURT: I know you as Harris, but I kept calling
16 you Mr. Harris. Mr. Butler.

17 Would you consider the captain's job a blue-collar
18 job or a white-collar job?

19 MS. ANDERSON: In those terms, the captains serve --
20 a white-collar job.

21 THE COURT: Why?

22 MS. ANDERSON: He serves as an executive. He is the
23 head of his station. He is the main manager. He is a
24 manager of the station and its personnel.

25 THE COURT: Okay. So I'm going to give you the same

1 example that I gave Mr. Butler, but with a little bit of a
2 different twist. So, again, in a former life I was a
3 manager at the U.S. Attorney's Office. And I carried a
4 full caseload while I was a manager, but I didn't have the
5 ability to fire anyone, I didn't have the ability to
6 unilaterally discipline anyone, I didn't have the ability
7 to send someone home unilaterally if they, you know, made
8 some kind of mistake. Like put them on leave without pay.

9 I didn't have -- so was I a manager, or was I a
10 front-line worker?

11 MS. ANDERSON: You were absolutely a manager.
12 There's no requirement under Factor 4 of the executive
13 exemption that the individual manager have to have
14 unilateral authority to hire, fire, promote, demote. It
15 simply must be that he has, as a job duty, -- gives
16 suggestions and recommendations. And those suggestions
17 and recommendations don't always have to be heard and
18 agreed with by his superiors, okay? They just must be
19 given particular weight.

20 And here the record is replete with instances of when
21 there have been terminations, fire captains have been the
22 ones recommending the termination, and the chief has given
23 those recommendations significant weight.

24 Same with promotions. Plaintiff Weymouth sat on four
25 different promotional panels. The fire chief met with

1 her, and the other panel members on each of them. Her top
2 three candidates were promoted in each instance.

3 There's also plenty of testimony about how the fire
4 captain -- the fire chief calls the fire captains. Not a
5 lieutenant, a fire captain, about promotions within his
6 station, and has given those recommendations significant
7 weight. And that's the controlling test: Whether or not
8 the recommendations are given particular weight.

9 THE COURT: All right. So tell me anything else that
10 you would like to tell me that I haven't covered with my
11 questions that makes it such that I should rule in your
12 favor.

13 MS. ANDERSON: Okay. I'd like to respond, if I
14 might, to one of Mr. Butler's arguments which was talking
15 about preparedness in that the -- he left the Court with
16 the notion that station captains, to the extent that he
17 ensures preparedness of his men, that that equals first
18 response duties. And that is a notion that is not
19 contained in the record or in the regulations.

20 In fact, the preamble makes a very clear division
21 between what are first response duties and what are
22 executive duties within the fire division. And one of the
23 things that the preamble notes is that it lists expressed
24 duties that would constitute executive management
25 functions, and would qualify a fire suppression employee

1 as a high level executive. And some of those include
2 coordinating and implementing training, ensuring
3 operational readiness through supervision, inspection of
4 personnel and inspection of equipment.

5 And that's precisely what Henrico fire captains do.
6 Unlike many of the other localities where the fire captain
7 sits on a particular unit and sits instead of a lieutenant
8 and serves as a working foreman, the Henrico fire captain
9 sits instead as the station captain. He is not embedded
10 with a particular unit, but instead works across all of
11 the units and therefore meets the expressed duties that
12 are listed in the preamble that would make him an
13 executive.

14 THE COURT: All right.

15 MS. ANDERSON: As to the issue of damages, I'll just
16 make note, I think the record is very clear about the
17 County's good faith efforts that it took before 2004 when
18 the regulation was implemented, and then thereafter after
19 the implementation in August of 2004. This was not a
20 decision made in haste. It was a decision made based on
21 the controlling case law at the time.

22 And that controlling case law has not fundamentally
23 changed here in the Fourth Circuit. You still have -- you
24 the *Morrison* decision from last fall, and you have
25 decisions in other circuits that if the decision were

1 being looked at today, the County Attorney's Office would
2 very likely make the very same opinion, render the same
3 opinion, because, I would submit to the Court, that we got
4 it right back in 2004.

5 And so the County relied in good faith on its County
6 Attorney's opinion, and so therefore the Court should
7 exercise -- shouldn't get to the issue of damages,
8 exercises its discretion and not award liquidated damages.
9 And certainly the plaintiffs have made no showing of
10 willfulness.

11 THE COURT: All right.

12 MS. ANDERSON: Thank you.

13 THE COURT: Thank you very much.

14 So, Mr. Butler, I want you to respond just to two
15 things. So this won't be a wholesale response.

16 MR. BUTLER: Yes, sir.

17 THE COURT: I gave each of you an opportunity to
18 answer my questions and to get everything out, but there's
19 two things I want to hear from you about.

20 First, I want to hear about your -- do you have any
21 response to her argument that the lieutenant is actually
22 the working foreman and not the station captain?

23 MR. BUTLER: Yes, sir. This goes to the notion that
24 the first tier supervisor, the lieutenant, is the working
25 foreman but not the second tier supervisor. Their

1 argument would work if the fire captain did not roll with
2 that engine every time it leaves the station when they're
3 on duty. And that's the testimony. That when the engine
4 leaves -- and it's because of minimum staffing.

5 They don't have the luxury of having a captain that
6 sits, as this work chart would have you believe, back at
7 the station, and dispenses and elects when he goes and
8 when he doesn't. I mean, they have to go. And they do
9 go. And the record should be clear on that that they're
10 always on the unit.

11 The County's position is that because of the second
12 supervisor, the second tier supervisor, that by
13 definition, by organizational chart definition, they
14 cannot be a working foreman. That belies the facts. They
15 ignore the hands-on duty, as they ignore the application
16 of the First Responder Regulation.

17 I don't know how they got to this point, but to argue
18 to this Court that Henrico can ignore the First Responder
19 Regulation because it doesn't matter because they say,
20 under their organizational chart, that the captain is not
21 a working foreman ignores the facts and I think goes to
22 their financial motivation to misclassify these captains
23 over a period of 10 years.

24 So, you know, the captains very clearly do the job.
25 And the Department of Labor looks at the function you're

1 doing. And they're in the First Responder Regulation.

2 How you can address this case without looking at that, I
3 don't know.

4 THE COURT: Okay. The second thing I want you to
5 respond to is you didn't discuss liquid damages.

6 MR. BUTLER: Liquidated damages. Right.

7 THE COURT: And she did, so I just wanted to give you
8 a chance to respond on that since you haven't raised that
9 issue.

10 MR. BUTLER: Certainly. So, the rule under the Fair
11 Labor Standards Act is that liquidated damages are
12 presumed. In other words, the Fair Labor Standards Act
13 doesn't allow for emotional distress recovery or punitive
14 damages. They allow for if you're not paid in the pay
15 period due because, you know, the law is set up to
16 compensate workers who are entitled to overtime their
17 overtime, and if an employer does not pay it in the pay
18 period due and award liquidated damages, or doubling of
19 the 2-year damages, which is the standard to reach back
20 limitations period, is presumed. And for them to overcome
21 that, there's two types of good faith. Section 11 and
22 Section 12.

23 And the Act allows good faith where the Department of
24 Labor has come in and said, you know, here, in your
25 circumstance, this is permitted and you're doing it okay.

1 If they rely on a D.O.L. opinion, if they rely on some
2 statement of the Department of Labor, that constitutes
3 good faith. It's not this kind of touchy-feely that we
4 felt like we were doing it okay and we got it wrong. I
5 mean, that's not what good faith -- to overcome the
6 presumed liquidated damages.

7 Now, if we go to willful and -- and to avoid
8 liquidated damages, good faith is their burden. I mean,
9 they have to prove good faith. In other words, they -- we
10 get liquidated damages unless they meet their burden on
11 good faith.

12 For willfulness, there's a third year that applies if
13 we can show willful violation. And that, of course, can
14 be liquidated or doubled as well. That's where we get
15 into this argument that they had no factual basis based on
16 the duties of what these captains did. And they still to
17 this day really don't recognize, even in court, that the
18 captains are on the engines and are doing the first
19 responder duties.

20 Their position is that they found a way to finesse to
21 get around having to apply the First Responder Regulation
22 that virtually every other jurisdiction across the
23 country -- I mean, many many jurisdictions. Most
24 jurisdictions in Virginia. But many many jurisdictions
25 have accepted this.

1 And how Virginia -- how Henrico's fire captains are
2 different, how they operate in any other fire station in
3 the country, is a mystery. Every station has multiple
4 levels. You know, they're going to have lieutenants and
5 captains.

6 I mean, this is a pretty typical -- we handled a case
7 not too long ago in Portsmouth against the City of
8 Portsmouth who also didn't pay their fire captains
9 overtime. They resolved the case after -- after
10 discovery.

11 But the fact is that they relied on the same second
12 tier supervisor that the captain was not a working
13 foreman. The HR person in Portsmouth claimed to not even
14 know that the captains were riding on the engines.
15 Henrico knows. They just put their head in the sand
16 ostrich-like. I mean, they try to ignore it.

17 They really want to look at here's our job
18 description, here's what we would like, here's the
19 ultimate responsibilities of the captains. And we don't
20 deny anything. The captain has some responsibility for
21 these roles.

22 But that does not outweigh their primary function,
23 which is to get on that engine and respond to, what the
24 County would say, the first matter of urgency. But it's
25 their primary duty. It's why they're there. It's why

1 they're there 24/7. It's why they're on those trucks.

2 That's their primary duty.

3 THE COURT: Okay.

4 MR. BUTLER: And I think preparedness can't be
5 divorced from that.

6 THE COURT: Thank you.

7 MR. BUTLER: Thank you.

8 THE COURT: One second.

9 Okay. Very good.

10 So I presume both of you want the transcript, is that
11 right, or you don't?

12 MR. BUTLER: Your Honor, I mean, it -- not until we,
13 I guess, know which way this is going. I mean, we will
14 need a transcript.

15 I suppose in order to review for the -- for Judge
16 Payne for the review and recommendation, that --

17 THE COURT: Do you want it or not?

18 MR. BUTLER: I don't think we need it at this point
19 from the plaintiffs.

20 MS. ANDERSON: The County will take a copy of the
21 transcript.

22 THE COURT: Okay. Very good. If you will get with
23 the court reporter after we're adjourned.

24 So we will -- I will review all of this and have
25 something out shortly.

MR. BUTLER: Thank you, Your Honor.

THE COURT: And shortly is relative.

Anything else from the plaintiff?

Anything else from the defense?

MS. ANDERSON: Thank you, Your Honor.

THE COURT: All right. Very good.

(The proceeding concluded at 3:00 p.m.)

REPORTER'S CERTIFICATE

I, Krista Liscio Harding, OCR, RMR,
Notary Public in and for the Commonwealth of
Virginia at large, and whose commission expires
March 31, 2016, Notary Registration Number 149462,
do hereby certify that the pages contained herein
accurately reflect the notes taken by me, to the
best of my ability, in the above-styled action.
Given under my hand this 27th day of July, 2015.

Krista Liscio Harding, RMR
Official Court Reporter